

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

LONTEX CORPORATION,

Plaintiff,

v.

NIKE, INC.,

Defendant.

Civil Action No.: 18-cv-5623

(Hon. Michael M. Baylson)

**DEFENDANT NIKE, INC.'S STATEMENT OF UNDISPUTED FACTS
IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

In support of its Motion for Summary Judgment, and pursuant to D.1. of the Court's Pretrial Procedures, Defendant NIKE, Inc. ("NIKE") respectfully submits the following Statement of Undisputed Facts setting forth, in numbered paragraphs, all undisputed material facts with record references.

A. 2006-2008: Lontex's Failure to Launch the "Cool Compression" Brand

1. Lontex Corporation

1. Mr. Nathan owns 100% of Lontex. Durham Decl.¶ 5, Ex. 1 ("E. Nathan Depo. 1") at 36:13-15, 34:5-13.
2. Today, Lontex only has two employees, Mr. Nathan and his daughter, Samantha Nathan. Durham Decl.¶ 8, Ex. 1 ("S. Nathan Depo.") at 10:6-8.
3. Lontex is a small company, with brands that "no one has ever seen," and most consumers have "never heard of." Durham Decl.¶ 160, Ex. 157 ("McDonald Depo.") at 200:20-23; 215:9-216:10; 276:11-24.

2. The SWEAT IT OUT brand


4. By March 1990, Lontex had developed and was manufacturing and marketing compression undergarments, sports girdles, sports bras, and t-shirts under the brand name SWEAT IT OUT. Durham Decl.¶¶ 232, 233, 236, Exs. 229, 230, 233 (TM Reg. Nos. 1653120, 2015835, 3579266 respectively); S. Nathan Depo. at 111:15-20.
5. SWEAT IT OUT is Lontex's primary brand for its products, as Ms. Nathan testified, SWEAT IT OUT "is the brand name. I mean, SWEAT IT OUT has always been the brand name that I put everything under." S. Nathan Depo. at 231:11-16.

3. A separate COOL COMPRESSION business

6. In or around February 2006, Mr. Nathan, decided to create a new business focused on selling Lontex's "Performance Compression" garments to the healthcare industry. E. Nathan Depo. 1 at 45:14-46:3.
7. Mr. Nathan wanted to sell the "Performance Compression" garments to medical professionals or those "more educated" than the general public. E. Nathan Depo. 1 at 36:19-37:12.
8. Mr. Nathan believed that a different brand was necessary to sell these garments to the healthcare industry because "Sweat it Out" was too "dirty." E. Nathan Depo. 1 at 45:14-46:3; Durham Decl.¶ 7, Ex. 3 ("E. Nathan Depo. 3") at 875:10-17.

9. Lontex engaged a marketing consultant, Condict & Company, to develop the “Cool Compression” brand name and logo, product packaging called a “board,” other marketing materials, and an e-commerce website. E. Nathan Depo. 1 at 46:4-21.
10. In or around April 2006, Lontex purchased the cool-compression.com and coolcompression.com domain names. Durham Decl.¶ 89, Ex. 85, (LTX_EDPA_00003644).
11. On December 1, 2006, Lontex formed a separate entity named Cool Compression, LLC to manufacture and sell moisture wicking compression apparel to the medical field only. E. Nathan Depo. 1 at 49:10-19; Durham Decl.¶ 162, Ex. 159 (PA Secretary of State Business Entity Details); Durham Decl.¶ 178, Ex. 175 (LTX_EDPA_00001907).
12. Lontex issued a press release announcing the launch of Cool Compression LLC on February 5, 2007. Durham Decl.¶ 107, Ex. 103 (LTX_EDPA_00007165).
13. On March 30, 2007, Mr. Nathan described Cool Compression as one segment of Lontex, specifically as “a collection of Compression Tops & Bottoms to help alleviate pain and help with rehabilitation post surgery and more.” Durham Decl.¶ 123, Ex. 119 (LTX_EDPA_00011639).

4. The COOL COMPRESSION trademark registrations

14. On April 19, 2006, Lontex filed U.S. Trademark Application Serial No. 78/864,885 for the COOL COMPRESSION word mark claiming an “intent to use” the mark on men's, women's and children's clothing, namely, swimwear, compression shirts, compression shorts, compression tights, in class 25. This application registered as U.S. Trademark Registration No. 3416053 on April 22, 2008. Durham Decl.¶ 180, Ex. 177 (USPTO records).
15. On August 29, 2006, Lontex filed U.S. Trademark Application Serial No. 78/963,029 for the COOL COMPRESSION design mark [] claiming an “intent to use” the mark on men's, women's and children's clothing, namely, swimwear, compression shirts, compression shorts, compression tights, in class 25. This application registered as U.S. Trademark Registration No. 3416236 on April 22, 2008. Durham Decl.¶ 181, Ex. 178 (USPTO records).
16. On May 16, 2008, Lontex filed U.S. Trademark Application Serial No. 77/476,891 for the COOL COMPRESSION word mark claiming an “intent to use” the mark on compression supports, namely, compression sleeves for use as ankle supporters, arm supporters, elbow supporters, wrist supporters, knee supporters, compression tights and compression leggings, all for medical use and abdominal compression shorts, back support shorts, thigh groin hip support shorts, compression body suits, compression vests, and compression shirts, all for medical use, in class 10. This application registered as

U.S. Trademark Registration No. 3,611,406 on April 28, 2009. Durham Decl.¶ 182, Ex. 179. (USPTO records).

17. Mr. Nathan hoped that registering the COOL COMPRESSION word mark in connection with goods in Class 10 would enable doctors to prescribe use of the products and allow the patient to have it eligible for healthcare coverage. E. Nathan Depo. 1 at 192:12-195:12.
18. On June 19, 2007, Lontex submitted a specimen for its COOL COMPRESSION trademark (U.S. Reg. No. 3,416,053) to the USPTO showing the COOL COMPRESSION mark on garment boards that it thought it might use but was not actually using at the time of filing. Durham Decl.¶ 152, Ex. 149 at NIKE 44411, E. Nathan Depo. 2 at 761:24-763:23.
19. On August 16, 2007, the USPTO issued an office action refusing registration because the mark appearing in the specimen did not match the mark as applied for because it read COOL™ COMPRESSION. Durham Decl.¶ 152, Ex. 149 at NIKE-00044397-98.
20. On February 12, 2008, Lontex resubmitted its specimen, removing the TM symbol. Durham Decl.¶ 152, Ex. 149 at NIKE-00044390-96.
21. On April 29, 2013, Lontex submitted a photograph of a care label, not sewn into a garment, bearing the COOL COMPRESSION mark, in connection with its combined declaration of use and incontestability under Sections 8 and 15, knowing the mark was not in use with all of the registered goods and services. Durham Decl.¶ 152, Ex. 149 at NIKE-00044368-75; E. Nathan Depo. 2 at 772:18-776:25.
22. On April 20, 2018, Lontex likewise submitted a photograph of a care label, not sewn into a garment, bearing the COOL COMPRESSION mark, in connection with its combined declaration of use and application of renewal of registration under Sections 8 and 9, despite knowing the mark was not in use with all of the goods in the registration. Durham Decl.¶ 152, Ex. 149 at NIKE-00044358-65; E. Nathan Depo. 2 at 782:10-786:7.
23. On June 19, 2007, Lontex submitted a specimen for its COOL COMPRESSION logo trademark (U.S. Reg. No. 3,416,236) to the USPTO showing the COOL COMPRESSION mark on garment boards that it was not actually using at the time of filing. Durham Decl.¶ 183, Ex. 180 at NIKE-00044485-90; E. Nathan Depo. 2 at 795:13-18.
24. On August 16, 2007, the USPTO issued an office action refusing registration because the mark appearing the specimen did not match the mark as applied for because it read COOL™ COMPRESSION. Durham Decl.¶ 183, Ex. 180 at NIKE-00044474-75.
25. On February 12, 2008, Lontex resubmitted its specimen, removing the TM symbol. Durham Decl.¶ 183, Ex. 180 at NIKE-00044467-73.
26. On April 29, 2013, Lontex submitted a photograph of a heat transfer COOL COMPRESSION logo on a piece of red fabric, in connection with its combined

declaration of use and incontestability under Sections 8 and 15 knowing it was not in use with all of the registered goods and services. Durham Decl.¶ 183, Ex. 180 at NIKE-00044445-50; E. Nathan 795:20-797:6; 797:25-798:20.

27. On April 20, 2018, Lontex submitted a photograph of the COOL COMPRESSION mark on a packaging insert, in connection with its combined declaration of use and application of renewal of registration under Sections 8 and 9. Durham Decl.¶ 184, Ex. 181 at NIKE-00044434-40.
28. On May 16, 2008, Lontex submitted a specimen for its COOL COMPRESSION trademark (U.S. Reg. No. 3,611,406) to the USPTO showing the COOL COMPRESSION mark on a heat transfer logo on a piece of white fabric. Durham Decl.¶ 184, Ex. 181 at NIKE-00044344-50.
29. On May 2, 2014, Lontex submitted a photograph of a photograph of a care label, not sewn into a garment, bearing the COOL COMPRESSION mark, in connection with its combined declaration of use and incontestability under Sections 8 and 15. Durham Decl.¶ 184, Ex. 181 at NIKE-00044300-05.
30. On April 5, 2019, Lontex submitted a photograph of the COOL COMPRESSION mark on various garments and their packaging, in connection with its combined declaration of use and application of renewal of registration under Sections 8 and 9, despite knowing it was not using the mark on all of the registered goods. Durham Decl.¶ 184, Ex. 181 at NIKE-00044258-78; E. Nathan Depo. 2 at 814:11-820:23.

5. Lontex did not launch the COOL COMPRESSION business

31. The Cool Compression website was not operational in 2007. E. Nathan Depo. 1 at 122:10-20.
32. Lontex admits it never used the “Cool Compression” product packaging board that Conduct designed, and never sold the prototype compression garments that were outwardly branded with the COOL COMPRESSION Mark and logo though iron-on labels. E. Nathan Depo. 1 at 336:3-11; E. Nathan Depo. 2 at 439:1-440:8.
33. Mr. Nathan testified: “Well, we ---we--- we came across the people that said, what are you doing: I really don’t care what you call it, it does what I want to my team. It does what I want for my rehab, it does what I want, you know, please, don’t confuse us. So the overwhelming was not to go into that, as we call it, two different brand with the same [g]ood, but two different brand with the same theory, but to just stay with one brand.” E. Nathan Depo. 1 at 47:5-15.
34. Ultimately, instead of creating two brands, Nathan decided to sell his products under one brand, Sweat It Out, but with “the technology of Cool Compression.” In other words, the products were branded as Sweat It Out products, with the “Technology of the fabric, that the fabric was stretching in all direction[s] over 200 percent.” E. Nathan Depo. 1 at 48:11-22.

35. As of December 19, 2008, the coolcompression.com domain name pointed to the e-commerce website that Conduct created for Lontex. Durham Decl.¶ 179, Ex. 176 (<https://web.archive.org/web/20081219065443/http://coolcompression.com:80/index.html>).
36. Lontex never sold any product through that e-commerce site and then forwarded the coolcompression.com and cool-compression.com domains to its website at sweatitout.com. S. Nathan Depo. at 198:8-22; E. Nathan Depo 1 at 209:11-17.
37. On August 17, 2011, Mr. Nathan described the Cool Compression e-commerce site as “a site we designed under a separate brand name, Cool Compression, to market to the medical community, as opposed to the general public who would shop at www.sweatitout.com.” He further stated, [REDACTED] Durham Decl.¶¶ 33, 223, Exs. 29, 220 (1SEO_EDPA_00008183, LTX_EDPA_00030986).
38. Nathan shuttered Cool Compression LLC in 2012 because it wasn’t generating any sales. E. Nathan Depo. 1 at 49:10-19.

B. 2008-2016: Lontex Used SWEAT IT OUT, Not COOL COMPRESSION

1. The SWEAT IT OUT “Performance Compression” garments

39. Lontex issued a press release on March 30, 2016 that states: “SWEAT IT OUT® specializes in compression shorts, tights, and shirts that help athletes avoid injuries and rehabilitate quicker from injuries.” Durham Decl.¶ 158 Ex. 155 (<http://www.sbwire.com/press-releases/recover-prevent-an-injury-with-sweat-it-out-compression-products-677033.htm>).
40. Lontex’s 2008 brochure described the SWEAT IT OUT compression garments as follows:

TRUE COMPRESSION

We at SWEAT IT OUT® are specializing in Compression Shorts, Tights, and Shirts to help prevent injuries and also to help with rehabilitation of an injury.

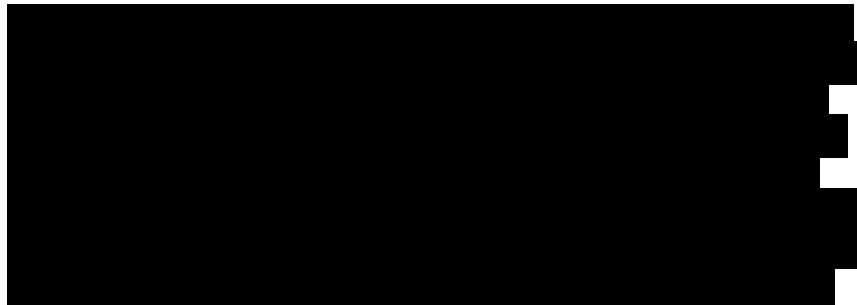
Go to www.sweatitout.com and increase your knowledge and understanding about Compression before buying a known brand name that does not give you true compression.

Don't assume that all compression is the same!!!
The stretch and recovery of the fabric used is the most important part of the Compression product. Most compression apparel will not help with injury and might cause you even greater pain and keep existing injuries from healing.

Durham Decl. ¶ 99, Ex. 95 (LTX_EDPA_00005835).

a. Lontex's fabric used in the SWEAT IT OUT garments

41. In an e-mail titled "Advantages of using SWEAT IT OUT Compression" sent in 2013, Lontex explained how the fabric and design of its garments provide advantages:



Durham Decl. ¶ 161, Ex. 158 (LTX_EDPA_00030319).

42. Mr. Nathan testified that 10% or 12% of spandex or LYCRA fiber in a typical compression garment is not "true compression" because, while it provides some tightness next to the skin, it does not provide the same medical benefits as Lontex's SWEAT IT OUT "Performance Compression" garments. E. Nathan Depo. 1 at 95:24-102:12.
43. In order to provide the wearer "true compression" and the same medical benefits as Lontex's garment, Mr. Nathan testified, "you have to go higher in the amount of LYCRA you put in [the garment]." E. Nathan Depo. 1 at 95:24-102:12.

44. Lontex referred to the fabric in its SWEAT IT OUT garments as TRUE COMPRESSION and PERFORMANCE COMPRESSION between 2009 and 2013. Durham Decl.¶¶ 184, 40, 39, 187, 188, 189 and Exs. 181, 36, 35, 184, 185, 186 (<https://web.archive.org/web/20090718151744/http://sweatitout.com/musclerecovery/>; <https://web.archive.org/web/20110203031632/http://www.sweatitout.com/>; <https://web.archive.org/web/20100515045359/http://www.sweatitout.com/>; <https://web.archive.org/web/20120827232000/http://www.sweatitout.com/products/compression-shorts-tights.html>; <https://web.archive.org/web/20130530024511/http://www.sweatitout.com/products/compression-shorts-tights.html>; <https://web.archive.org/web/20140228005112/http://www.sweatitout.com/products/compression-tops.html> respectively).

b. The branding used on the SWEAT IT OUT garments

45. Between 2008 and 2016, Lontex’s “Performance Compression” garments were branded with the SWEAT IT OUT Marks. Lontex applied the SWEAT IT OUT Logo to the exterior of its “Performance Compression” garments in several locations. Lontex applies an iron-on, heat transfer SWEAT IT OUT Logo on the chest and upper back of the compression shirts, the sleeve of the long-sleeve compression shirt, and on the leg of the compression shorts and tights. E. Nathan Depo. 2 at 439:1-14.
46. For compression shorts and tights, Lontex also applies a fabric tag with a SWEAT IT OUT Logo to the garment’s exterior waistband. Durham Decl.¶ 10, Ex. 6 (“Hosni Depo.”) at 71:20-72:15.
47. On August 15, 2016, at the direction of the law firm of Pirkey Barber, Marksmen, Inc. placed an order on Lontex’s website sweatitout.com, for a size large pair of 1900 Performance Compression Shorts in navy. The shorts arrived on August 16, 2016. The words “COOL COMPRESSION” did not appear anywhere on the shorts and the shorts had a label sewn inside that said “SWEAT IT OUT.” ECF 124-6; Durham Decl.¶ 190, Ex. 187 (“Schrader Declaration”) at ¶¶1-7).

2. Target Customers for the SWEAT IT OUT garments

48. Lontex’s customers for the SWEAT IT OUT “Performance Compression” garments are individuals desiring to wear compression apparel, including persons of any age that engage in physical activity. Durham Decl.¶ 24, Ex. 20 (Lontex’s response to Rog 2); E. Nathan Depo. 1 at 287:23-289:21; S. Nathan Depo. at 114:11-23.
49. Lontex specifically targets “persons desiring assistance with muscle support, persons desiring assistance with prevention of injuries, and persons desiring assistance with rehabilitation of an injury or venous disorder.” Durham Decl.¶ 24, Ex. 20 (Lontex’s response to Rog. 2).
50. Lontex’s digital marketing agency, 1SEO, testified that “the target audience for SWEAT IT OUT is more medical-based,” and that the SWEAT IT OUT products are “prevention

and recovery of injuries.” Durham Decl.¶ 9, Ex. 5 (“Bechtel Depo.”) at 118:24-119:17; 244:17-245:25; Ex. 261; Durham Decl.¶ 34, Ex. 30 (1SEO_EDPA_00025523)

51. 1SEO understood Lontex’s target audience to be “different than the normal under armor or nike type crowd, he's really focusing on athletes and the real benefits of the product.” 1SEO also testified that “the target audience for SWEAT IT OUT is more medical-based,” and that the SWEAT IT OUT products are “prevention and recovery of injuries.” Bechtel Depo. at 118:24-119:17; 244:17-245:25; Ex. 261; Durham Decl.¶ 34, Ex. 30 (1SEO_EDPA_00025523).
52. 1SEO testified the distinction between the SWEAT IT OUT products and NIKE’s products:



Durham Decl.¶ 34, Ex. 30 (1SEO_EDPA_00025523); Bechtel Depo. at 118:24-119:17; 244:17-245:25, Ex. 261.

3. Channels of Distribution for the SWEAT IT OUT garment

53. Lontex sold the SWEAT IT OUT “Performance Compression” garments directly to consumers through its www.sweatitout.com website, often following interactions directly with Mr. Nathan or from physician and physical therapist referrals. Durham Decl.¶ 24, Ex. 20 (Lontex’s response to Rog. 1); E. Nathan Depo. 1 at 210:14-16; Durham Decl. ¶ 16, Ex. 12 (“Knudson Depo.”) at 41:11-17.
54. Other than its own website, Lontex has not sold SWEAT IT OUT “Performance Compression” garments through any other general consumer retail channels. E. Nathan Depo. 1 at 209: 5-9.
55. Lontex has not sold its SWEAT IT OUT “Performance Compression” garments through retail outlets such as Dick’s Sporting Goods, REI, Macy’s, Amazon, or Zappos. E. Nathan Depo. 1 at 209:18-210:7; E. Nathan Depo. 3 at 990:24-992:23.
56. Lontex also sold SWEAT IT OUT “Performance Compression” garments to professional sports teams through the medical staff (athletic trainers, primarily) and to colleges and universities. For example, in an email promoting the SWEAT IT OUT “Performance Compression” garments to an athletic trainer for professional tennis players, Lontex described its channels of distribution as follows:

We supply our garments to NFL, NHL, and MLB Teams through the Medical Staff, Colleges and Universities, and Individual Athletes as well. We do not sell to Retail at all. We make only specialty Compression Garments, for many different Therapeutic uses.

Durham Decl.¶ 193, Ex. 260 at LTX_EDPA_00000949.

4. Retail prices of the SWEAT IT OUT garments

57. Lontex sold the following products at the following price points from 2014-2018:

Style	2014	2015	2016	2017	2018
1900 Performance Compression Shorts	49.95	56.95	56.95-59.95	59.95	59.95
1900AK Performance Compression Tights	75.95	82.95	86.95	86.95	96.95
1900PN Performance Compression Back Support Shorts	75.95	82.95	86.95	86.95	86.95
1900SL Performance Compression Thigh, Groin, Hip Support Shorts	75.95	82.95	86.95	86.95	86.95
1900SLCP Performance Compression Thigh, Groin, Hip Support Capri	109.95	119.95	125.95	125.95	125.95
3019 Performance Compression Sleeveless Shirt	74.95	84.95	89.95	89.95	89.95
3020 Performance Compression Short Sleeve Shirt	79.95	89.95	96.95	96.95	96.95
3021 Performance Compression Long Sleeve Shirt	85.95	95.95	99.95	99.95	99.95
3022 Performance Compression Improved Posture Short Sleeve Shirt	99.95	109.95	115.95	115.95	115.95
3023 Performance Compression Improved Posture Long Sleeve Shirt	92.95	102.95	109.95	109.95	109.95

Durham Decl.¶¶ 98, 83-88, 93, 94, 114, 92, 197, 113, 132, 100, 102, 104 Exs. 94, 79 – 84, 89, 90, 110, 88, 194, 109, 129, 96, 98, 100 (LTX_EDPA_00005556; LTX_EDPA_00003368; LTX_EDPA_00003369; LTX_EDPA_00003370; LTX_EDPA_00003371; LTX_EDPA_00003373; LTX_EDPA_00003374; LTX_EDPA_00004034; LTX_EDPA_00004043; LTX_EDPA_00008371; LTX_EDPA_00004029; LTX_EDPA_00004032; LTX_EDPA_00008284; LTX_EDPA_00036219; LTX_EDPA_00005930; LTX_EDPA_00005944; LTX_EDPA_00005979).

58. In 2016, Lontex added new products: (1) 1900PNWB (Back Support Shorts with Velcro Belt) which retailed for \$179.95-199.95; (2) 1900WQHL/R (Thigh Wrap Left/Right) which retailed for \$159.95-179.95; (3) 1900GWL/R (Groin Wrap Left/Right) which

retailed for \$159.95-179.95; 3022W (Wrapped Support Improved Posture Compression Shirt L/S) which retailed for \$189.95-199.95; and (4) 3023W (Wrapped Support Improved Posture Compression Shirt S/S) which retailed for \$179.95-199.95.. Durham Decl.¶ 81, Ex. 77 (LTX_EDPA_00001794).

59. Lontex's price lists for its SWEAT IT OUT products in 2009, 2010, 2016, and 2019 did not use the COOL COMPRESSION trademark. E. Nathan Depo. 1 at Exs. 42-45, 47, 48.

5. Sales of SWEAT IT OUT garments

60. Between 2006 and January 2019, Lontex sold roughly 25,685 units of SWEAT IT OUT "Performance Compression" garments for a total gross revenue of roughly \$1,329,848. Durham Decl.¶¶ 270-274, Exs. 261-265 (LTX_EDPA_00000867, LTX_EDPA_00000905, LTX_EDPA_00024506, LTX_EDPA_00024507).
61. Lontex's invoices between 2008 and 2016 did not display the COOL COMPRESSION mark. E. Nathan Depo. 1 at 314:12-19.

6. SWEAT IT OUT advertising and marketing materials used by Lontex

62. Lontex has not identified any advertising expenditures that it spent on promoting the COOL COMPRESSION Marks between 2008 and 2016. Durham Decl. ¶ 2; E. Nathan Depo. 2 at 490:7-492:7; 500:9-501:24.
63. Following NIKE's alleged use of the words "cool" and "compression," Lontex admits to making the choice to scale down its company advertising and marketing activities to just a few thousand dollars. E. Nathan Depo. 2 at 530:3-24.

a. SWEAT IT OUT brochures

64. At least as early as 1999, Lontex commissioned Labelcraft Press, Inc., a company based out of Perkasi, Pennsylvania, to create a brochure for its SWEAT IT OUT "Performance Compression" product line. E. Nathan Depo. 1 at Ex. 37; Durham Decl.¶ 108, Ex. 104 (LTX_EDPA_00007208; Durham Decl.¶ 65, Ex. 61 (LTX_EDPA_00001135); S. Nathan Depo. at 129:8-130:7.
65. In 2008, Lontex's brochure described the SWEAT IT OUT "Performance Compression" garments as follows:

TRUE COMPRESSION

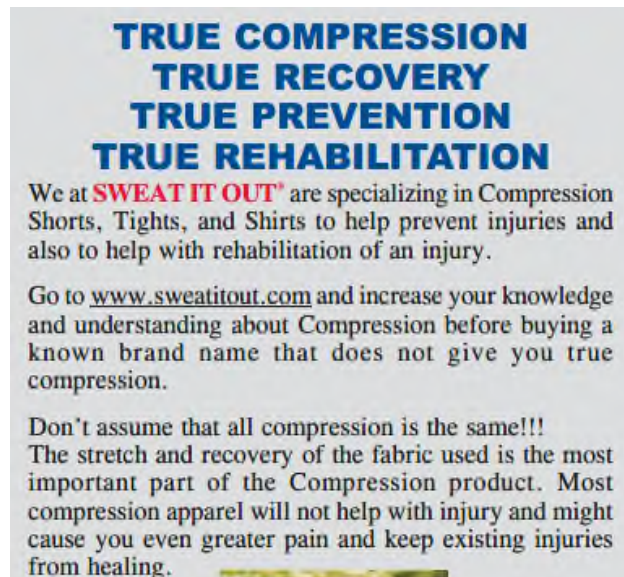
We at SWEAT IT OUT® are specializing in Compression Shorts, Tights, and Shirts to help prevent injuries and also to help with rehabilitation of an injury.

Go to www.sweatitout.com and increase your knowledge and understanding about Compression before buying a known brand name that does not give you true compression.

Don't assume that all compression is the same!!!
The stretch and recovery of the fabric used is the most important part of the Compression product. Most compression apparel will not help with injury and might cause you even greater pain and keep existing injuries from healing.

Durham Decl.¶ 99, Ex. 95 (LTX_EDPA_00005835).

66. With Mr. Nathan's approval, Lontex updated its brochure several times between 2008 and 2016. (Durham Decl.¶¶ 130, 110, 109 Exs. 127, 106, 105 (LTX_EDPA_00026070; LTX_EDPA_00007296-97; LTX_EDPA_00007224).
67. Below is an excerpt of Lontex's brochure from 2014:



Durham Decl.¶ 203, Ex. 200 (LYCRA-00000175).

68. Lontex provided this brochure to potential customers and customers by attaching it to customer e-mails and including it in product packaging. E. Nathan Depo. 3 at Ex. 308, 312.
69. Lontex's brochures did not use the COOL COMPRESSION Mark until January 2016. E. Nathan Depo. 1 at 355:21-23; 256:21-257:19

b. The SWEAT IT OUT website

70. Since 1999, Lontex's website has resided at the sweatitout.com domain name. Durham Decl. ¶ 176, Ex. 173
(<https://www.godaddy.com/whois/results.aspx?checkAvail=1&tmskey=tmskey%3D123&domain=www.sweatitout.com>).
71. In 2011, Lontex engaged 1SEO Technologies, a digital marketing agency located in Bristol, Pennsylvania, to redesign Lontex's website. Bechtel Depo. at 42:25-43:4; Durham Decl. ¶ 204, Ex. 201 (<https://1seo.com/contact-us/>).
72. Lontex also engaged 1SEO to provide additional digital marketing services, such as: maintenance of the www.sweatitout.com website; search engine optimization ("SEO") services, like purchasing Google AdWords, keywords, and other tools to drive web traffic to Lontex's website; content creation services, like writing Lontex's blog posts, press releases, infographics, short videos, and email marketing campaigns; and managing Lontex's social media presence on Facebook, Twitter, LinkedIn, YouTube, and other sites. Bechtel Depo. at 48:10-51:18; 71:20-72:3; 72:8-73:12.
73. In 2013, Mr. Nathan wrote the following text for the Lontex website homepage and sent it to 1SEO for it to be included on the Lontex website:

We at SWEAT IT OUT® are specializing in Compression Shorts, Tights, and Shirts to help prevent injuries and also to help with rehabilitation of an injury. Our major customers for this line of Running Compression Gear are Professional Athletes in the NFL, MLB, NBA and NHL, and College and University Team Sports Programs.

If you suffer from knee, hamstring, quad, hip, lower back, upper back or shoulder, elbow or wrist pain, we make the right Compression Garment for you. Don't let pain affect what you love to do.

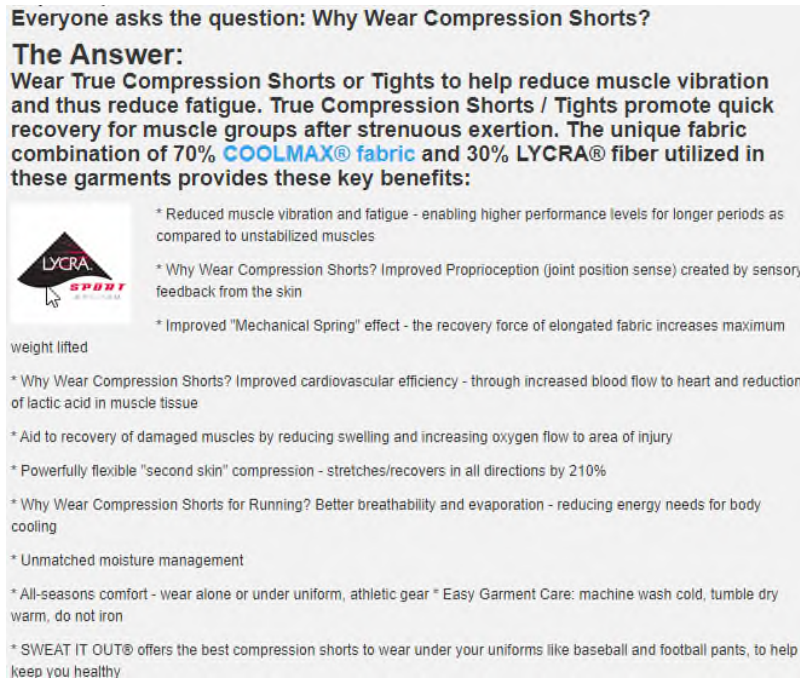
The stretch and recovery of the fabric used is the most important part of the Compression product. Most compression apparel will not help with injury and might cause you even greater pain and keep existing injuries from healing.

Check out our Running Gear for Men and Running Gear for Women and increase your knowledge and understanding about Compression before buying a known brand name that does not give you true compression.

No matter what your Sport or Activity, don't assume that all compression is the same!!! Made proudly in the USA-you are more than welcomed to call and contact us with questions. We are happy to help with our expert advice.

Durham Decl. ¶ 205, Ex. 202 (LTX_EDPA_00031362).

74. In 2015, Lontex's website promoted its "Performance Compression" garments using the SWEAT IT OUT marks and the phrase "True Compression" (not COOL COMPRESSION):



Durham Decl. ¶ 237, Ex. 234

(<http://web.archive.org/web/20150418005715/http://www.sweatitout.com/products/compression-shorts-tights.html>).

75. [REDACTED]
- <https://web.archive.org/web/20150309024552/http://www.sweatitout.com/>).

76. [REDACTED]

c. SWEAT IT OUT social media

77. Lontex has advertised through Facebook, Instagram, Google, Pinterest, and Twitter. E. Nathan Depo. 1 at 219:6-14.
78. In 2012, Lontex engaged 1SEO to perform “social media optimization” services (“SMO”), which included the creation (or utilization) of Lontex’s Facebook, Twitter, LinkedIn, Blog, and photos/video (e.g., YouTube) accounts to help generate internet traffic to Lontex’s website via these social media outlets. Durham Decl. ¶¶ 122, 209, Exs. 118, 206 (LTX_EDPA_00011478-85; LTX_EDPA_00029815).
79. Lontex’s Twitter account (@sweatitout) was launched on June 10, 2011. Durham Decl. ¶ 210, Ex. 207 (LTX_EDPA_00011077).
80. Lontex’s second tweet, posted minutes after the first, stated: “True Compression by Sweat It Out - you will feel the difference the second you put it on! sweatitout.com.” Durham Decl. ¶ 210, Ex. 207 (LTX_EDPA_00011077).
81. Athletes have tweeted on behalf of Lontex about SWEAT IT OUT; however, no athletes tweets reference “Cool Compression” because, according to Mr. Nathan, “Cool Compression” is technology and nobody would mention a technology in a tweet. E. Nathan Depo. 1 at 93:8-24; Durham Decl. ¶¶ 54, 169, 170, Exs. 50, 166, 167 (<https://twitter.com/Calebtrumbull/status/677306661996924928>, <https://twitter.com/Calebtrumbull/status/682306867889094659>, <https://twitter.com/ChrisWilliams21/status/677215185258549249>).
82. On November 6, 2014, Lontex announced that its blog on its website was live and provided content to “those who are interested in learning about their products.” Durham Decl. ¶ 163, Ex. 160 (<http://www.sbwire.com/press-releases/sweat-it-out-announces-that-their-blog-is-officially-up-running-on-their-website-559918.htm>).
83. [REDACTED] Durham Decl. ¶ 239, Ex. 236 (1SEO_EDPA_00006105).

d. Lontex press releases

84. Lontex began issuing press releases in June 2012 to promote its “Performance Compression” garments. Durham Decl. ¶ 166, Ex. 163 (<http://www.sbwire.com/press-releases/sweat-it-out-unveils-new-high-quality-compression-garments-for-runners-149599.htm>).
85. One Lontex press release, from August 7, 2012, promotes the “Performance Compression” garments’ stretch and recovery features using the SWEAT IT OUT Marks and the phrase “True Compression.” Durham Decl. ¶ 164, Ex. 161 (<http://www.sbwire.com/press-releases/sweat-it-out-a-complete-sportswear-provider-155458.htm>).

86. 1SEO's promotional activities for Lontex included preparing press releases. For example, In January 2013, Mr. Nathan wrote the following text for a Lontex press release and sent it to 1SEO for it to be included in the release:

We at SWEAT IT OUT® specialize in TRUE COMPRESSION for both the Upper and Lower body to help prevent injuries and also to help with rehabilitation from an existing injury.

SWEAT IT OUT® Performance Compression shorts, Performance Compression Tops, Running Gear, and Performance Compression Pants are made from a unique, powerful fabric designed to be worn next to the skin for a tight fit providing true compression to the underlying tissue and muscle without restriction or discomfort. The Lycra® content in these garments is the highest available for stretch and recovery.

Durham Decl. ¶ 29, Ex. 25 (1SEO_EDPA_00004900).

87. In March 2016, a Lontex press release stated:



Durham Decl. ¶ 211, Ex. 208 (LTX_EDPA_00010093).

e. Lontex's written communications with customers

88. Lontex periodically sent e-mails to customers promoting its "Performance Compression" garments and using the SWEAT IT OUT Marks and the phrase "True Compression" to promote the key benefits of the fabric used in the Lontex garments, *i.e.*, the stretch and recovery characteristics of the 70% COOLMAX / 30% LYCRA blend. *e.g.*, Durham Decl. ¶ 129, Ex. 126 (LTX_EDPA_00026067-70); E. Nathan Depo. 3 at Exs. 308, 309, 310, 311, 312.
89. As of 2014, Lontex's email blasts did not contain the COOL COMPRESSION trademark. E. Nathan Depo. 3 at 989:2-990:23.
90. Lontex has not produced evidence of a written communication sent to or received from a customer between 2008 and 2016 that contains use of the COOL COMPRESSION Marks. Durham Decl. ¶ 3.

f. Lontex's endorsements and testimonials

91. As part of its marketing activities, Lontex entered into agreements with athletes to wear its compression apparel. For instance, in 2013, Lontex issued a model release agreement to soccer player Chris Williams for wearing its SWEAT IT OUT and “Cool Performance Wear” products. Durham Decl. ¶ 177, Ex. 174 (WILLIAMS-00000001-4).
92. Mr. Williams recorded several testimonial videos promoting and endorsing SWEAT IT OUT compression garments. Durham Decl. ¶ 15, Ex. 11 (“Williams Depo.”) at 123:1-23, 126:3-23.
93. Furthermore, Mr. Williams helped arrange similar promotional contracts for his teammates, whereby Nathan would send them free SWEAT IT OUT compression garments in exchange for a testimonial video promoting SWEAT IT OUT. Williams Depo. at 137:15-140:28.

g. Lontex’s appearances at conferences, events, and trade shows

94. Between 2008 and 2016, Lontex appeared at conferences, events, and trade shows to market and promote its SWEAT IT OUT “Performance Compression” garments. Durham Decl. ¶¶ 95, 97, 111, 101, 131, Exs. 91, 93, 107, 97, 128 (LTX-00004390, LTX_EDPA_00005149; LTX_EDPA_00007403; LTX_EDPA_00005936; LTX_EDPA_00032935).
95. Mr. Nathan—Lontex’s sole salesman and brand champion—claims to have spent a lot of time speaking with customers and educating them about the fabric that Lontex uses in its SWEAT IT OUT “Performance Compression” garments. E. Nathan Depo. 1 at 42:5-43:15; E. Nathan Depo. 3 at 920:4-24; 962:22-963:4.
96. According to Mr. Nathan, no print materials or formal presentations were necessary because “presentation, talking to people in conferences, showing them what [Lontex] do[es] and what the technology is all about is 99 percent sale.” E. Nathan Depo. 3 at 987:1-5.
97. Lontex does not “advertise that much in print media” but attends conferences instead and speaks to trainers while there to “educate them about stretch, recover, what[] the content of the label means.” E. Nathan Depo. 3 at 962:22-963:4; 990:24-992:23.
98. Lontex claims that it takes years to acquire its customers and allocates significant resources to attending professional trade shows and speaking to customers about the products prior to purchase. E. Nathan Depo. 1 at 261:24-263:2.

h. Lontex’s business plans

99. [REDACTED] Durham Decl. ¶ 105, Ex. 101 (LTX_EDPA_00005989). The document does not mention Cool Compression or the Cool Compression Marks.

100.



Id. at 6164. There is no reference to the COOL COMPRESSION Marks in this document.

7. Lontex differentiates SWEAT IT OUT from other compression garments on the market

101. Mr. Nathan refers to the compression fit garments made by other companies, such as Under Armour and NIKE, which typically contain 10-20% of spandex or “stretchy material,” as “lingerie fabric.” E. Nathan Depo. 1 at 87:13-88:11; 95:24-102:12; Durham Decl.¶ 84, Ex. 77 (LTX_EDPA_00001162).
102. Mr. Nathan testified that he “taught [Lontex’s consumers] how to distinguish [Lontex’s compression garments from other compression fit garments on the market].” E. Nathan Depo. 1 at 88:6-11.
103. Mr. Nathan testified that 10% or 12% of spandex or LYRCRA fiber in a typical compression fit garment is not “true compression” because it does not provide the same medical benefits as Lontex’s SWEAT IT OUT “Performance Compression” garments. E. Nathan Depo. 1 at 97:20-25.
104. Mr. Nathan testified that to receive “true compression” “you have to go higher in the amount of LYCRA you put in [the garment].” *Id.* He also testified that “the more you put LYCRA, the more expensive the fabric it is.” E. Nathan Depo. 1 at 97:20-98:4.
105. Lontex has advertised in its brochures that it provides better support than its competitors’ compression garments. Durham Decl.¶¶ 99, 130, 225, 109, Exs. 95, 127, 222, 105 (LTX_EDPA_00005835; LTX_EDPA_00026070; LTX_EDPA_00007296-97; LTX_EDPA_00007224).
106. Lontex’s used the following messaging to differentiate its products : “Don’t assume that all compression is the same. Other brands [i.e., NIKE PRO, Under Armour, and other brands] will give you only the impression of compression and in many cases will not provide the support you need which will lead to greater pain and a longer recovery time in rehabilitation, if at all.” Durham Decl.¶¶ 103, 99, 130, 225, 109, Exs. 99, 95, 127, 222, 105 (LTX_EDPA_00005945; *see* LTX_EDPA_00005835; LTX_EDPA_00026070; LTX_EDPA_00007296-97; LTX_EDPA_00007224).
107. Lontex’s website, in 2014, included the following statement about product differentiate: “Expect high compression when you buy our compression sleeves, not the soft, silky feeling many people are used to wearing. We are not about fashion statements, we are about helping you keep your body healthy.” Durham Decl.¶¶ 240, 41, Ex. 237, 37 (LTX_EDPA_00009520; <https://>

web.archive.org/web/20150423015927/http://www.sweatitout.com/products/posture-and-arm-supporters.html).

108. Lontex ran a traditional print advertising in Fuel Magazine in 2012, which stated: “DON’T ASSUME ALL COMPRESSION IS THE SAME! Athletes are wearing the WRONG COMPRESSION GARMENTS! They buy or are being given branded compression [*i.e.*, NIKE PRO and Under Armour] without knowing what it’s supposed to do. Find out from the experts at SWEAT IT OUT® and you’ll be amazed at how many unnecessary injuries could be prevented.” Durham Decl.¶¶ 90, 91, Ex. 86, 87 (LTX_EDPA_00003995, LTX_EDPA_00004000).
109. According to Lontex, its consumers were well aware of the difference between Lontex’s and NIKE’s compression garments, claiming that his consumers view NIKE’s compression products as “inferior.” Durham Decl.¶ 24, Ex. 20 (Lontex’s response to Rog. 10) .
110. Mr. Nathan testified that consumers could differentiate between Lontex’s SWEAT IT OUT “Performance Compression” garments and NIKE’s compression garments:

BY MS. DURHAM: Q. ... I'm asking you if these trainers who know you and you say have known your product have ever confused your product with Nike's product?

THE WITNESS: You know the difference between my product and Nike product with your eyes closed. You don't really have to even look at it. You just have to touch it. That's it.

E Nathan Depo. 3 at 919:15-23.

111. 1SEO stated that Lontex’s target audience to be [REDACTED] Durham Decl.¶ 34, Ex. 30 (1SEO_EDPA_00025523).
112. Likewise, Ricky Lovelace stated that “Nike and Under Armor don’t make the same product as [Lontex].” Durham Decl.¶ 128, Ex. 125 (LTX_EDPA_00025594).
113. Mr. Nathan disparaged NIKE products generally to Lontex’s customers in distinguishing Lontex’s garments from NIKE’s: “Take the Nike back to the store and demand a refund—even if you have worn them, you should not pay for garbage.” Durham Decl. ¶ 243, Ex. 240 (LTX_EDPA_00026255).

C. Lontex Attempts to Sell the COOL COMPRESSION Mark

114. In 2014, Lontex contacted U.S. Trademark Exchange to sell its COOL AIR, COOL POWER, and COOL COMPRESSION trademarks. E. Nathan Depo. 1 at 387:14-388:13; Durham Decl.¶¶ 67, 68, 121, Exs. 63, 64, 117 (LTX_EDPA_00001227, LTX_EDPA_00001235; LTX_EDPA_00010751).

115. Lontex entered into a Trademark Marketing Agreement to sell the COOL AIR, COOL POWER, and COOL COMPRESSION trademarks on August 5, 2015. Durham Decl.¶¶ 70, Ex. 66 (LTX_EDPA_00001254-57).
116. [REDACTED] Durham Decl. ¶¶ 241, 80, 70, 69, Exs. 238, 76, 66, 65 (LTX_EDPA_00001226; LTX_EDPA_00001458; LTX_EDPA_00001254; LTX_EDPA_00001237-38).
117. U.S. Trademark Exchange created and distributed a promotional video regarding the Marks and issued a press release to potential buyers. Durham Decl.¶¶ 78, 77, 213, 79 Exs. 74, 73, 210, 75 (LTX_EDPA_00001361, 1352 (promotional video); LTX_EDPA_00001434 (press release); *see* LTX_EDPA_00001378 (press release questionnaire)).
118. Lontex offered to sell its COOL AIR, COOL POWER, and COOL COMPRESSION trademarks to [REDACTED] Durham Decl.¶¶ 71, 127, Exs. 67, 124 (LTX_EDPA_00001258-59, LTX_EDPA_00025458).
119. These efforts were unsuccessful, and Lontex eventually terminated its agreement with U.S. Trademark exchange in December 2015, without selling the Cool Compression Marks, to focus on its ongoing efforts to sell the entire business. Durham Decl.¶¶ 72-76 Exs. 68-72 (LTX_EDPA_00001271, 1272, 1273; 1281, *see* LTX_EDPA_00001278).

D. NIKE and the NIKE PRO Product Line

1. NIKE

120. NIKE, Inc., based near Beaverton, Oregon, is a leading designer, marketer and distributor of authentic athletic footwear, apparel, equipment and accessories for a wide variety of sports and fitness activities. (Durham Decl. ¶ 317, Ex. 134 (NIKE Inc., Form 10-K for the fiscal year ended May 31, 2019)).
121. Since inception in 1967, NIKE has grown its NIKE brand into one of the most recognizable in the world, most recently ranked as the 16th best brand globally. Durham Decl. ¶ 157, Ex. 154 (<http://interbrand.com/best-brands/best-global-brands/2019/ranking>).
122. In fact, between 2016 and 2019, Interbrand rated NIKE in the top 20 most valuable global brands. (Durham Decl. ¶¶ 154-157, Exs. 151-154 (<https://www.interbrand.com/best-brands/best-global-brands/2016/ranking/>; <https://www.interbrand.com/best-brands/best-global-brands/2017/ranking/>;

<https://www.interbrand.com/best-brands/best-global-brands/2018/ranking/>;
<https://www.interbrand.com/best-brands/best-global-brands/2019/ranking/>).

123. NIKE's intellectual property includes, but is not limited to, its NIKE trademark and the iconic "swoosh" logo. (Durham Decl. ¶ 137, Ex. 134 (NIKE Inc., Form 10-K for the fiscal year ended May 31, 2019).
124. NIKE has affiliations with high-profile professional athletes and professional sports leagues, such as Major League Baseball and the National Football League. Durham Decl. ¶ 11, Ex. 7 ("Munro Depo.") at 41:10-25.
125. NIKE sells its products direct to consumers through NIKE-owned retail stores and digital platforms, as well as through an extensive network of independent retailers. Durham Decl. ¶ 137, Ex. 134 (NIKE Inc., Form 10-K for the fiscal year ended May 31, 2019).
126. As of 2018, NIKE's direct selling operations in the U.S. included 31 NIKE in-line stores and 220 NIKE factory stores, as well as online at NIKE.com. (Durham Decl. ¶ 135, Ex. 132 (NIKE Inc., Form 10-K for the fiscal year ended May 31, 2018).
127. As of 2018, NIKE sold products (at the wholesale level) to thousands of retail accounts in the United States, including a mix of footwear stores, sporting goods stores, athletic specialty stores, department stores, skate, tennis and golf shops and other retail accounts. *Id.*

2. NIKE PRO

128. The NIKE PRO product line, which is part of the NIKE "training" category, was launched in or around 2004. Durham Decl. ¶ 148, Ex. 145 (NIKE-00041449).
129. NIKE created the NIKE PRO line to provide base layer products and to deliver on athlete needs for thermoregulation and comfort. *Id.*
130. The NIKE PRO products sell for between \$28 and \$35. Munro Depo. at 34:14-35:4, Ex. 227.
131. The target customer for NIKE PRO products is "anybody who sweats." More specifically, NIKE baselayer "serve[s] a great large demographic through our distribution points and our geography.· So Nike Baselayer typically goes to a lower level of distribution such as moderate department stores like Kohl's.· And it typically is at a lower price point. Therefore, it could encompass and be super democratic, a 15-year-old boy to an 84-year-old man." Durham Decl. ¶ 12, Ex. 8 ("Johnson Depo") at 283:19-22; Munro Depo. at 36:15-37:4; Durham Decl. ¶ 215, Ex. 248 ("Hall Depo.") at 131:21-24.
132. A small percentage of the NIKE PRO products were also sold to equipment managers for professional sports teams, but the teams' athletic training staff does not purchase NIKE Pro products from NIKE. Durham Decl. ¶ 196, Ex. 192 at ¶¶ 14-15.

133. In 2009, NIKE launched “NIKE Pro Combat” to focus on gameday performance and provide sport-specific protection to athletes. Durham Decl. ¶ 148, 140, 142, Exs. 145, 137, 139 (NIKE-00041449; <https://investors.nike.com/investors/news-events-and-reports/investor-news/investor-news-details/2009/Nike-to-Debut-Nike-Pro-Combat-at-All-Star-Weekend/default.aspx>, <https://investors.nike.com/investors/news-events-and-reports/investor-news/investor-news-details/2009/Nike-Outfits-NCAA-Basketball-Teams-for-Battle-with-Innovative-Uniform-System/default.aspx> ; <https://investors.nike.com/investors/news-events-and-reports/investor-news/investor-news-details/2009/Nike-Debuts-the-Ultimate-in-Athletic-Performance-Protection-with-Nike-Pro-Combat/default.asp>).
134. The hangtags for the NIKE PRO Combat products in 2009 show use of “stay cool” and “stay warm” for thermoregulation features and “compression” and “fitted” fits. Durham Decl. ¶ 245, Ex. 242 (NIKE-00041354).
135. In 2011, NIKE launched Hypercool 2.0, and with it a NIKE PRO Combat Hypercool “fitted” short sleeve top and a “compression” short. Durham Decl. ¶ 139, Ex. 136 (<https://news.nike.com/news/nike-introduces-hypercool-20>).
136. In October 2012, NIKE launched NIKE PRO Combat Hyperwarm, designed to keep the athlete’s body regulated for inclement weather with breathability, water resistance, and a streamlined fit. Durham Decl. ¶ 138, Ex. 135 (<https://news.nike.com/news/nike-hyperwarm-performance-tested>).



137. By Fall/Holiday 2012 seasons, the NIKE PRO Combat product line included different products each intended to address a specific athlete insight: (1) NIKE PRO Combat Hyperstrong to “stay protected”; (2) NIKE PRO Combat Hyperwarm to “stay warm”; (3) NIKE PRO Combat Hypercool to “stay cool”; and (4) NIKE PRO Combat Core for “all day every day.” Durham Decl. ¶ 146, Ex. 143 (NIKE-00041369).



138. The products in the NIKE PRO line were offered in a variety of silhouettes (tights, shorts, short sleeve top, long sleeve top, sleeveless top, etc.) and in “compression” or “fitted” fit. *Id.*
139. The NIKE PRO “Cool” products were introduced to the market in Summer 2015. Durham Decl. ¶ 153, Ex. 150 at NIKE-00045533.
140. Each NIKE PRO “Cool” product that was offered in a “compression” fit is accused of infringement in this action. Durham Decl. ¶ 147, Ex. 144 NIKE-00041373.
141. Within the NIKE PRO “Cool” products are “core”—level and are offered at the lowest price point and widest level of distribution. Durham Decl. ¶ 151, Ex. 148 (NIKE-00041710); Munro Depo. at 34:14-35:18.
142. [REDACTED]
Munro Depo. at 24:14-27:12; Durham Decl. ¶ 214, Ex. 211 (NIKE-00041889).
143. [REDACTED] *Id.*
144. [REDACTED] *Id.*
145. NIKE PRO products were made available in various “fits,” corresponding with the fit of the product, such as “fitted” or “compression” (with compression being the tighter of the two fits). (Munro Depo. at 49:3-15, 60:25-61:20).
146. [REDACTED]
147. [REDACTED]

[REDACTED] Munro
Depo. at 35:23-39:6.

148. NIKE's target market for the NIKE PRO product line is all athletes, and that is "athlete" with an asterisk, meaning that "if you have a body you are an athlete." (Durham Decl. ¶ 242, Ex. 239 (<https://about.nike.com/>); Munro 39:20-40:5.). As NIKE's Global Product Director for NIKE PRO testified:

We want to be inclusive. And so while we will design into a sharp point so that we can have a point of view and we can really learn and lead, we want to allow everybody to have the ability to wear our product and to feel good about doing so. That's why we have the bottom of these pyramids that are internal documents, but you can see Cool, Warm, et cetera, that go to the broadest depths of distribution. So, again, to reference a Kohl's or a Dick's Sporting Goods. And these are at really attractive price points for consumers, but they know that it's stuff that is also worn at the very pinnacle of athletes. (Munro Depo. at 40:19-41:8).

149. NIKE does not advertise or market or promote the "core" level NIKE PRO Cool products. Munro Depo. 112:20-113:13, 114:5-8; Johnson Depo. 266:3-8; 266:12-22.
150. The primary (most prominent) branding for the NIKE PRO Cool products was the NIKE SWOOSH. Durham Decl. ¶ 150, Ex. 147 (NIKE-00041620 at 41660).
151. The secondary branding for NIKE PRO Cool products was DRI-FIT. *Id.*
152. The interior of the NIKE PRO Cool products contained a heat transfer label with either the NIKE SWOOSH and DRI-FIT. *Id.*; Durham Decl. ¶ 215, Ex. 212 (NIKE-00040455 at 40459).
153. NIKE PRO tops had "NIKE PRO" category callout branding on the neck tape around the interior seam of the neck, while NIKE PRO shorts and tights had "NIKE PRO" callout on the exterior of the waistband. Durham Decl. ¶ 150, Ex. 147.
154. [REDACTED]
[REDACTED] Durham Decl. ¶ 15, Ex. 9 ("Mangum Depo") at 75:12-14; 76:4-77:19; Durham Decl. ¶ 145, Ex. 142 (NIKE-00040506); Johnson Depo. at 42:24-43:12.
155. [REDACTED]
Durham Decl. ¶ 150, Ex. 147 (NIKE-00041620 at 41621).
156. [REDACTED]
[REDACTED] *Id.* at NIKE-00041627.

157. This initiative was driven by NIKE consumer insights such as: “I shop by look, silhouette, and feel.” “I don’t really shop by/know product names.” “I just want to know what it does for me.” *Id.* at NIKE-00041628.

158. [REDACTED] *Id.*

159. [REDACTED]

160. [REDACTED]

161. NIKE’s use of “comp” would not have been externally facing. Johnson Depo. at 255:16-21.

162. NIKE used the word “cool” and the word “compression” to describe two different attributes of some of its NIKE PRO products. NIKE used the word “cool”—as in NIKE PRO Cool—to describe a material benefit of the NIKE PRO product: keeping the athlete cool and dry via NIKE’s Dri-Fit sweat-wicking fabric and mesh ventilation. Johnson Depo. at 4:13-18; Mangum Depo. at 47:22-50:19; Munro Depo. at 236:3-14; 245:9-15.

3. NIKE Catalogs

163. NIKE catalogs are not forms of marketing but rather “a catalog is an educational material that provides the information that is relevant and key for people to understand and learn about the product.” Munro Depo. at 114:16-25.

164. The product descriptors “NIKE PRO Cool” and “compression” sometimes appeared in NIKE’s catalog copy directly next to each other (e.g., “Nike Pro Combat Cool Compression 6" Men’s Shorts”) (NIKE-00030901 at 30942) and other times adjacent but separated by other descriptors (e.g., “COOL HBR COMP 3/4 TIGHT YTH” & “NIKE Hypercool High Brand Read Three-Quarter Boy’s Compression Tights”) Durham Decl.¶ 143, Ex. 140 (NIKE-00015659 at 16171).

165. Other times, NIKE catalogs used abbreviations “cl” for “cool” and “comp” for “compression,” and other time it did not use the product descriptors “cool” and “compression” at all. Durham Decl.¶ 144, Ex. 141 (See Style No. 703082 at NIKE-00030901 at 30943).

166. The two words “cool” and “compression” together do not have any special meaning at NIKE. The phrase “cool compression” is not a NIKE technology platform or a material

benefit or feature of any NIKE products. Mangum Depo. at 139:24-140:9; Durham Decl.¶ 17, Ex. 13 (“Mack Depo.”) at 97:16-25; 179:13-180:9; Durham Decl.¶ 14, Ex. 10 (“Bromert Depo.”) at 38:6-39:1, 46:11-24; *see* Durham Decl.¶ 145, Ex. 142 (NIKE-00040506).

167. NIKE creates tech sheets for its products that are used to educate its employees and retail associates about new products. Johnson Depo. at 186:13-187:24.
168. NIKE tech sheets are not marketing materials. They provide “technical information on the reason why the product was built, the insights that we were going after, the key information on the materials, the design, any features, benefits that [NIKE is] delivering. As well as standard information to allow the individuals who utilize them, typically sales teams, to know the breadth of the sizes we may offer or color or anything else that would add some product detail.” Munro 115:4-16.
169. NIKE tech sheets are not distributed to or shared with end consumers. Munro Depo. at 116:13-15; Mangum Depo. at 71:16-20.
170. Tech sheets for the NIKE PRO products at issue use the word “men’s” or “boy’s” to describe the products’ consumer group, use of the phrase “cool” to describe the products’ material benefit of keeping the athlete cool, the word “compression” to describe the products’ fit, and words like “shirt,” “tank,” “shorts,” and “tights to describe the products’ silhouette, and words like “long sleeve,” “short sleeve,” “3/4,” “6” and “9” to describe the products’ length. (e.g., “Nike Pro Cool Compression 6” Men’s Shorts”) Durham Decl.¶ 216, Ex. 213 (NIKE-00042173).
171. Tech sheets are available on NIKE’s Sports Knowledge Underground portal and NIKE.net. Johnson Depo. at 186:13-187:24.
172. NIKE’s Sports Knowledge Underground portal is “a space in which retail associates can educate themselves about product.” Johnson Depo at 187:25-188:2.

4. NIKE.com

173. The NIKE PRO product line appeared on the nike.com website as of September 5, 2015 and April 22, 2016 under the NIKE PRO training collection of apparel. Durham Decl.¶¶ 133, 44, 257 Exs. 130, 40, 253 (LTX_EDPA_00036793, https://web.archive.org/web/20150905093819/http://store.nike.com/us/en_us/pw/mens-nike-pro-training-clothing/7puZbgdZ7u9Z9hk; https://web.archive.org/web/20160422053844/http://store.nike.com/us/en_us/pd/pro-cool-compression-tights/pid-10738142/pgid-11177416).
174. The nike.com product detail pages included detailed descriptions of the NIKE PRO products, including use of the word “men’s” to describe the products’ consumer group, use of the phrase “cool” to describe the products’ material benefit of keeping the athlete cool, the word “compression” to describe the products’ fit, and words like “shirt,” “tank,” “shorts,” and “tights to describe the products’ silhouette, and words like “long sleeve,”

“short sleeve,” “3/4,” “6” and “9” to describe the products’ length. Durham Decl.¶¶ 50, 51, 256 Exs. 44, 45, 252.

175. By August 21, 2016, the contested NIKE products appeared on the nike.com website without the “compression” fit descriptor. Durham Decl.¶ 45, Ex. 41 (https://web.archive.org/web/20160821225013/http://store.nike.com/us/en_us/pw/mens-nike-pro-compression/7puZobn).
176. In June 2017, the contested NIKE products appeared on the nike.com website without the “cool” material benefit descriptor and without the “compression” fit descriptor. Durham Decl.¶ 46, Ex. 42 (https://web.archive.org/web/20170614070634/http://store.nike.com/us/en_us/pw/mens-nike-pro-compression/7puZobn).
177. In July 2018, the contested NIKE products appeared on the nike.com website still without the “cool” material benefit descriptor and without the “compression” fit descriptor. Durham Decl.¶ 47, Ex. 43 (https://web.archive.org/web/20180704164358/http://store.nike.com/us/en_us/pw/mens-nike-pro-compression/7puZobn).

5. NIKE had no knowledge of Lontex’s COOL COMPRESSION Marks

178. NIKE first became aware of Lontex and the asserted COOL COMPRESSION Marks when the NIKE legal department received a letter dated April 8, 2016 from Gary A. Rosen, P.C., counsel for Lontex, alleging that Lontex was the purported owner of the COOL COMPRESSION Mark, that Lontex had purportedly used the COOL COMPRESSION mark in connection with athletic apparel since 2007, and that NIKE was allegedly using the COOL COMPRESSION Mark without Lontex’s authorization. Durham Decl.¶¶ 24, 217, Exs. 20, 214 (Lontex’s response to Rog. 9; LTX_EDPA_00010391).
179. The NIKE PRO product team that developed the NIKE PRO products alleged to infringe had no prior knowledge of Lontex or the asserted COOL COMPRESSION Marks. Mangum Depo. at 23:22-24:9.
180. NIKE’s Sports Marketing unit, that manages NIKE’s relationships with professional athletes and professional leagues and teams had no prior knowledge of Lontex or the asserted COOL COMPRESSION Marks. Durham Decl., ¶ 4.
181. [REDACTED] Durham Decl.¶ 218, Ex. 215 (“March 13th Hrg Tr.”) at 37:24-38:3.
182. NIKE provided the Court an in camera review of the NIKE legal department’s internal investigation of NIKE PRO Cool and the Court confirmed that this document did not contain any reference to Lontex or the asserted COOL COMPRESSION Marks. ECF 134 at 13, n. 5; March 13th Hrg Tr. at 37:24-38:15; 41:7-9.

183. [REDACTED] Magnum Depo. at 111:18-112:9; Johnson Depo. at 145:20-145:3; 147:12-148:15.


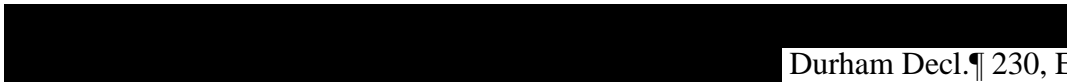

E. After Some Delay, Lontex Contacts NIKE in 2016, and Then Goes Silent

184. In December 2015, Nathan performed a Google search in which he discovered NIKE’s use of the phrase “cool compression.” E. Nathan Depo. 1 at 74:2-14.
185. Mr. Nathan hired counsel on contingency—Gary Rosen—and placed an order with NIKE for style 703094 on March 3, 2016. E. Nathan Depo. 3 at 1121:2-5, 241:23-242:20; Durham Decl. ¶¶ 124, 119, 64, Exs. 120, 115, 60 (LTX_EDPA_00012709; LTX_EDPA_00010446; LTX_EDPA_00000834).
186. The following day, Mr. Nathan stated: “I do not think that Nike is interested in purchasing the COOL COMPRESSION® Trademark. They are just using it to describe this ‘Pro Lite Compression Apparel’ online.” Durham Decl. ¶ 115, Ex. 111 (LTX_EDPA_00009366).
187. Lontex sent a demand letter to NIKE on April 8, 2016. Durham Decl. ¶ 125, Ex. 121 (LTX_EDPA_00013112).
188. NIKE sent a response to Rosen on May 12, 2016 stating that NIKE was using “cool” and “compression” “in a merely descriptive manner” to describe features of the NIKE PRO products. NIKE also stated that, in advance of receiving Lontex’s letter, it had already begun implementing changes to the nike.com website to further emphasize that “cool” and “compression” are used to describe the NIKE PRO products. Durham Decl. ¶ 126, Ex. 123 (LTX_EDPA_00013215).
189. After the sending of the initial demand letter, Lontex offered to license the COOL COMPRESSION trademark to NIKE. E. Nathan Depo. 1 at 389:25-390:20.
190. NIKE responded to Lontex’s May 16th follow up demand letter on July 19, 2016. In this letter NIKE indicated that was not interested in a license for the COOL COMPRESSION mark. Durham Decl. ¶ 117, Ex. 113 at LTX_EDPA_00010393 – 00010395.
191. Counsel for Lontex responded by requesting NIKE pay [REDACTED] to compensate Lontex. *Id.* at LTX_EDPA_00010396 – 00010398.
192. Lontex first contacted Ben Wagner’s prior firm, Mintz, Levin, Cohn, Ferris, Glovsky, and Popeo, P.C., near the end of 2016, about taking on this case against NIKE. E. Nathan Depo. 3 at 1158:14-1159:6.
193. Nathan stated Lontex “needed a law firm that . . . will be able to represent [Lontex] . . . and the funding [the firm] will take care of.” E. Nathan Depo. 3 at 1114:19-1115:9.

194. Lontex remained in contact with Mintz Levin “every week” between the end of 2016 and January 2018, but “could not come to agreement based on how much . . . money Lontex would have to pay to put toward the lawsuit.” E. Nathan Depo. at 1134:23-1135:22, 1158:14-1159:6.
195. After Mintz Levin recommended that Lontex retain its former partner, Mr. Harvey Saferstein, to contact NIKE, Mr. Saferstein sent a letter to NIKE in January 2018 regarding third-party use of “cool compression” on the Internet. E. Nathan Depo. 3 at 1134:23-1135:22; Durham Decl.¶ 118, Ex. 114 (LTX_EDPA_00010417).
196. Lontex fired Mr. Saferstein and retained Mr. Wagner. E. Nathan Depo. 3 at 1140:1-10.
197. Lontex then filed this lawsuit on December 31, 2018. (ECF No. 1).

F. April 2016-Present: Lontex Begins Promoting COOL COMPRESSION

1. Lontex’s extensive efforts to cover its prior non-use of COOL COMPRESSION

198. Upon discovering NIKE’s use of the “cool compression” phrase in December 2015, Nathan decided to resume use of “Cool Compression.” He instructed his daughter to place COOL COMPRESSION on “all invoices...on the website...[and] to print... 8,000 or 12,000 printed [brochures] with Cool Compression on every page.” Nathan also started to place COOL COMPRESSION labels on all boxes shipped. E. Nathan Depo. 1 at 88:21-90:5; 221:13-223:2; E. Nathan Depo. 2 at 462:25-263:7.
199. Nathan testified that he “started [putting] Cool Compression on everything in 2016....” E. Nathan Depo. 1 at 187:23-24.
200. Lontex, in 2016, added COOL COMPRESSION to Lontex’s invoices. S. Nathan Depo. at 232:15-21.
201. On January 31, 2016, Lontex emailed ISEO asking them to urgently add COOL COMPRESSION to its website and Facebook page. Durham Decl.¶ 229, Ex. 226 (LTX_EDPA_00010034).
202.  Durham Decl.¶ 31, Ex. 27 (ISEO_EDPA_00007077-79).
203.  Durham Decl.¶ 230, Ex. 227 (LTX_EDPA_00009531).
204.  ‘COOL

COMPRESSION®” on Lontex’s blog. Durham Decl. ¶ 32, Ex. 28 (1SEO_EDPA_00007333-38).

205. Lontex’ first blog post using the COOL COMPRESSION mark was posted on March 8, 2018. Durham Decl. ¶ 231, Ex. 228 (<https://sweatitout.com/fitness-attire-perfect-for-spring/>).

206. [REDACTED]
[REDACTED] Bechtel Depo. at 102:3-104:18; Durham Decl. ¶ 26, Ex. 22 (1SEO_EDPA_00002424).

207. On November 19, 2018 Nathan emailed Medco requesting that the COOL COMPRESSION trademark (in capital letters with the registration symbol) be placed online and every printed catalogue. E. Nathan 723:23-724:21, ex. 83; Durham Decl. ¶ 244, Ex. 241 (“Medco Decl.”) at ¶ 5.

208. [REDACTED]
[REDACTED] Bechtel Depo. at 110:23-114:21; Durham Decl. ¶ 30, Ex. 26 (Lontex’s response 1SEO_EDPA_00006909).

G. No Evidence of Actual or Likely Confusion and No Evidence That NIKE Benefited From Using These Common Words

1. No actual confusion

209. No one has ever sent NIKE products to Lontex asking if they were Lontex’s products. E. Nathan Depo. 1 at 255:20-25.

210. No one has ever asked Lontex if NIKE has licensed its COOL COMPRESSION technology, authorized NIKE to use the COOL COMPRESSION technology, or if Lontex and NIKE are affiliated in any way. E. Nathan Depo. 3 at 1036:4-17.

211. According to Lontex, its consumers were well aware of the difference between Lontex’s and NIKE’s compression garments, claiming that his consumers view NIKE’s compression products as “inferior.” (Durham Decl. ¶ 24, Ex. 20 (Lontex’s response to Rog. 10).

212. Mr. Nathan testified that consumers could easily differentiate between Lontex’s SWEAT IT OUT “Performance Compression” garments and NIKE’s compression garments. E. Nathan Depo. 3 at 919:15-23; 1036:4-17.

213. Mr. Nathan testified that he has never seen a NIKE product that has the words cool and compression on the product. E. Nathan Depo. 1 at 127: 4-8.

214. When Nathan has looked for NIKE “Cool compression” products in store, he has asked store associates for “Cool Compression by NIKE.” E. Nathan Depo. 1 at 284:18-20; 287:8-11; Durham Decl. ¶ 24, Ex. 20 (Lontex’s response to Rog. 6).
215. When Lontex’s expert, Jeffery Parkhurst, went to Dick’s Sporting Goods he specifically asked “where the Nike cool compression” products were located. Durham. Decl. ¶ 248, Ex. 245 (Parkhurst Depo.) at 70:25-71:9.
216. Mr. Parkhurst did not provide an explanation as to why he did not simply ask for “cool compression” products. Parkhurst Depo. 262:4-267:21
217. Lontex does not know of any instance of any customer mistakenly purchasing a NIKE product believe that they were actually purchasing the product from Lontex or that Lontex and NIKE were affiliated or connected in any way. E. Nathan Depo. 1 at 265:12-16.
218. Lontex produced declarations from former and current athletic trainers for MLB and NFL teams that Lontex's counsel prepared for the declarant. (ECF 169-1, ¶ 8). Lontex provided cut and paste images of the NIKE PRO products in NIKE catalogs and wholesale retailer websites to the declarants who then signed the aforementioned declarations which state the images “make me believe that Nike is using Lontex’s COOL COMPRESSION technology in these compression garments.” Durham Decl.¶¶ 192, 220, 194, 193, 219, 221, Exs. 189, 217, 191, 190, 216, 218 (Peduzzi Decl. ¶ 10, Cunningham Decl. ¶ 10, Smith Decl. ¶ 10, Leo Decl. ¶ 10, Kozak ¶ 10, Ball Decl. ¶ 10).

2. Consumer Surveys

219. Matthew Ezell and Hal Poret conducted consumer surveys to assess the likelihood of (a) forward and (b) reverse confusion in this case (the “Ezell Survey” and “Poret Survey,” respectively). Durham Decl.¶ 18, Ex. 14 (“Poret Report”) at 3; Durham Decl.¶ 19, Ex. 15 (“Ezell Report”) at ¶ 2; Durham Decl.¶ 246, Ex. 243 (“Ezell Decl.”); Durham Decl.¶ 247, Ex. 244 (“Poret Decl.”).
220. The Ezell Survey, which measured the likelihood of forward confusion, “clearly supports a finding of no likelihood of confusion.” Ezell Report at ¶ 33.
221. Specifically, the Ezell Survey reveals that: (a) none of the survey respondents reported that they believed that Lontex was the source of the Accused NIKE Product; (b) none of the survey respondents reported that they believed that the Accused NIKE Product is being made or put out with the authorization or approval of Lontex; and (c) none of the survey respondents reported that they believed that whoever puts out the Accused NIKE Product has a business affiliation or business connection with Lontex. Ezell Report at ¶ 32.
222. The Poret Survey, which measured the likelihood of both forward and reverse confusion, found that “there is not a likelihood of confusion created by NIKE’s use of “Cool” and “Compression” in connection with the relevant NIKE products.” Poret Report at 29.

223. Dr. Carol Scott, conducted a statistically significant and reliable consumer survey to “determine the extent to which interest in purchasing the NIKE apparel products accused in this matter is increased if those products are shown using “Cool Compression” in the product descriptions.” (the “Scott Report”). Durham Decl. ¶ 21, Ex. 17 (“Scott Report”) at ¶ 7.
224. The Scott Survey revealed that “interest in purchasing the [NIKE] products at issue in this matter is not increased by use of ‘Cool Compression’ as a product descriptor.” Scott Report at ¶ 8.
225. The Scott Survey measured purchasing interest for a pair of NIKE Pro tights and a NIKE Pro shirt and found that interest in purchasing either “was not significantly different between samples of consumers who saw web pages depicting these products with ‘Cool Compression’ in the descriptions versus samples of consumers who saw web pages for the same products that did not include the term ‘Cool Compression’ in the product descriptions.” Scott Report at ¶ 8.
226. And none of the Scott Survey respondents stated that “cool compression” was a reason for their interest in the NIKE Pro product. Scott Report at ¶ 8.
227. Lontex did not conduct any consumer surveys in this case. Durham Decl. ¶ 160, Ex. 157 McDonald Depo. at 12:25-13:12.

H. Third party use of “cool” and “compression”

228. “Cool” is a common term throughout the athletic apparel industry. Munro Depo. at 245:20-25.
229. Adidas has a Climacool line and Under Armour has a Cold Gear line. Munro Depo. at 245:20-25.
230. Virus Performance describes its V3 Tech Shorts as CO23|STAY COOL COMPRESSION V3 TECH SHORTS. Durham Decl. ¶ 174, Ex. 171 (<https://virusintl.com/products/co23-mens-stay-cool-compression-v3-tech-shorts>).
231. Orefice Ltd. advertises its tops and shorts as COOL COMPRESSION CREW TOP and COOL COMPRESSION SHORTS. Durham Decl. ¶ 173, Ex. 170 (<https://www.oreficeltd.com/under-shirtspants.html>).
232. FJM’s offers a CORELEMENTS STAY COOL COMPRESSION FIT SHORT SLEEVE top. Durham Decl. ¶ 58, Ex. 54 (<https://fjminc.com/products/relaxed-fit-short-sleeve>).
233. Honig also uses the terms “cool” and “compression” to sell its COOL SKIN COMPRESSION TIGHTS. Durham Decl. ¶ 59, Ex. 55 (<https://honigs.com/honig-s-cool-skin-compression-tights.html>).
234. McDavid’s UCOOL COMPRESSION ARM and LEG SLEEVES. Durham Decl. ¶¶ 171, 172 Exs. 168, 169 (<https://www.mcdavidusa.com/products/ucool-compression-leg->

sleeves-pair; <https://www.mcdavidusa.com/collections/all/products/ucool-compression-arm-sleeves-pair>).

235. Senfloco offers Women's Cool Compression Fit Terylene Spandex Tight Pants for Sport Training. Durham Decl. ¶ 159, Ex. 156 (<https://www.walmart.com/ip/Senfloco-Women-s-Cool-Compression-Fit-Terylene-Spandex-Tight-Pants-for-Sport-Training/316633555>).
236. Mr. Nathan testified that certain third party uses may infringe on its COOL COMPRESSION mark but that Lontex has taken no action to enforce its rights against those third parties. E. Nathan Depo. 3 at Exs. 330-32, 335, 336, 340.

November 4, 2020

Respectfully submitted,

By: /s/ Gina Durham

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of November, 2020, I caused Defendant NIKE, Inc.'s Statement of Undisputed Facts in Support of its Motion for Summary Judgment to be filed with the Clerk of Court of the United States District Court for the Eastern District of Pennsylvania using the ECF system, it is available for viewing and downloading from the ECF system, and a true and correct copy was served via ECF to all counsel of record registered with the ECF system.

BY: /s/ Ben Fabens-Lassen